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No. 03-5554

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

On Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR THE PETITIONER

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I. COMPELLING A PERSON DETAINED UPON REASONABLE SUSPICION[1] TO IDENTIFY HIMSELF TO THE POLICE VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.[2]

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[1] An erroneous factual assumption has unfortunately made its way into this case, namely, that Mr. Hiibel's teenage daughter was the passenger and that Mr. Hiibel was driving. The trier of fact made no such finding, nor does the evidence support such a finding. *See*, *e.g.*, Defendant's Exhibit A (6 minute videotape of incident), Justice Ct. Tr. Trans. Vol. II, Feb. 13, 2001, at 21; and Trooper Merschel's testimony that Mr. Hiibel indicated he was not driving, Justice Ct. Tr. Trans. Vol. I, Nov. 7, 2000, at 11. The Justice of the Peace who was the factfinder in this case found only that the female was in the cab of the truck, not that she was the passenger. J.A. at 4. On appeal before the district court the focus was on the officer's investigation of an alleged domestic battery, not a drunk driving situation. Dist. Ct. App. Trans., June 18, 2001, at 4, 21.

The first erroneous reference to this being an alleged drunk driving situation is the district court's order on appeal, even though the court's initial recitation of the facts makes no reference to Mr. Hiibel being the driver. J.A. at 10-12. Mr. Hiibel was neither tested nor arrested for drunk driving. The district court appears to have engaged in after-the-fact justification for the officer's actions and its characterizations should be given no weight before this Court. *Cf. U.S. v. Brignoni-Ponce*, 422 U.S. 873, 887 n.11 (1975) (declining to give any weight to after-the-fact justification for a stop). Unfortunately, erroneous assumptions about Mr. Hiibel's daughter being the passenger and him the driver made their way into the Nevada Supreme Court's opinion and some of the briefs filed in this Court. J.A. at 15-16; Pet. Br. at 4, 23 n.7; Resp. Br. at 8, 25, 29; *Amicus* U.S. Br. at 2; *Amicus* CJLF Br. at 2, 6, 17, 19; *Amicus* Cato Inst. Br. at 1, 2; *Amicus* ACLU Br. at 1. The trier of fact's findings should be relied upon when the facts are in dispute. *See*, *e.g.*, *Florida v. Bostick*, 502 U.S. 429, 431-32 (1991).

This case did not initiate as a traffic stop nor has it been treated as such. Regardless, the parties are in agreement that Deputy Dove was investigating an alleged battery or domestic battery, and thus agree that he was acting on reasonable suspicion when he approached Mr. Hiibel. Thus, the issue before this Court remains unchanged: whether the Constitution prevents the state from compelling people to identify themselves during a police investigation when they have been seized upon less than probable cause.

[2] Mr. Hiibel refused to identify himself because he did not feel the police officer had the right to compel that information. To the extent the

A. Being Compelled To Identify Oneself To The Police Is A Testimonial Communication Protected By The Fifth Amendment.

Respondent claims that stating one's name during a *Terry* stop is non-testimonial and therefore does not violate the Fifth Amendment. Resp. Br. at 30-35. In *Doe v. U.S.*, 487 U.S. 201 (1988), this Court recognized that, "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* at 210 (footnote omitted). A simple way to comprehend the difference between testimonial and non-testimonial evidence is to ask whether the person could lie in response to the question posed. George Fisher, *Evidence* 800 (2002).

Applying these definitions, NRS 171.123(3) compels testimonial communication from a suspect when it requires him to identify himself to an investigating officer. Giving one's name is an explicit assertion of a fact which discloses information, namely, one's identity.[3] One could lie in

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government claims he did not properly preserve his Fifth Amendment argument (*Amicus* U.S. Br. at 28, n.13), counsel at trial did argue *Berkemer v. McCarty*, 468 U.S. 420 (1984), a Fifth Amendment case. Justice Ct. Tr. Trans. Vol. II, February 13, 2001, at 22-24. Moreover, the Fifth Amendment argument was raised during the course of the appeal to the district court and the State never argued that the issue was not properly before the court. *See* App. Br. on Appeal, May 4, 2001, at 1, 3, 4; Resp. Ans. Br., May 9, 2001, at 2; App. Reply Br., May 14, 2001, at 1-3; Dist. Ct. Trans. on Appeal, June 18, 2001, at 7, 10, 23. Finally, the Fifth Amendment argument was raised before the Nevada Supreme Court. *See* Pet. for Writ of Cert., Dec. 4, 2001, at 7-11; Pet. for Rhg. Jan. 7, 2003, at 1-4. Therefore Petitioner submits that this issue is properly before this Court.

[3] Although respondent suggests the defendant can choose how to comply with the identification requirement, Resp. Br. at 32, the facts of this case are otherwise: Deputy Dove demanded Mr. Hiibel's identification, not merely his name. Justice Ct. Tr. Trans. Vol. II, February 13, 2001, at 15.

response to a question about one's name. The only logical conclusion which can be drawn is that identifying oneself to a police officer is testimonial.

Respondent tries to analogize the production of one's name to instances where this Court has approved compelled production of physical evidence to reveal some aspect of one's identity, such as blood samples, *Schmerber v. California*, 384 U.S. 757, 760-65 (1966); handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); or voice exemplars, *U.S. v. Dionisio*, 410 U.S. 1, 6-7 (1973). However, even in instances requiring the defendant to speak, it is only the physical properties of the evidence, *i.e.*, the sound of one's voice, which may be used: the content of the exemplar may not be used as proof of a crime. *Gilbert*, 388 U.S. at 266-67. Moreover, identity based on that physical evidence is ultimately determined by a third party. The cited instances involve non-communicative acts which produced physical evidence not protected by the Fifth Amendment and are therefore inapposite.[4]

When compelling a person to identify himself to an investigating officer, it is the content of the communication which is significant, not the manner of its delivery. Unlike the cases relied on by respondent, in cases such as this one involving compulsory identification, the person himself is required to provide the basis for determining his identity. Moreover, the officer would be allowed to testify in court regarding the content of the person's communication under

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[4] More importantly, contrary to the assertion that "producing an identification . . . raises no Fifth Amendment concerns," (*Amicus* U.S. Br. at 24), compelling a person to identify himself by providing a credential is as violative of the Fifth Amendment as compelling him to speak his name. *See Fisher v. U.S.*, 425 U.S. 391, 409-10 (1976); *Id.* at 428, 432 (concurring opinions); *Boyd v. U.S.*, 116 U.S. 616, 633-35 (1886).

Nev. Rev. Stat. 51.035(3)(a). Consequently, a compelled revelation of one's identity is a testimonial communication because it explicitly relates factual information whose substantive content can be used against the accused in court and is thus protected by the Fifth Amendment.

B. Identifying Oneself To A Police Officer During A *Terry* Stop Is An Incriminating Communication.

Respondent claims that giving one's name is essentially neutral and thus not incriminating. Resp. Br. at 35-42; *Amicus* U.S. Br. at 16-24. This claim ignores the realities of the criminal law and the facts of this case. One's name can be incriminating and aid in a criminal prosecution. For example, in Nevada the existence of a familial-type relationship is a necessary element of domestic battery and triggers greater punishments than ordinary battery. Nev. Rev. Stat. 33.018. The foundation for determining that relationship begins with one's name. In addition, the domestic battery laws are recidivist statutes which carry increasing punishments for repeat offenders. Nev. Rev. Stat. 400.485. Repeat felony offenses can lead to punishment as a habitual criminal, which carries a maximum penalty of life without the possibility of parole. Nev. Rev. Stat. 207.010(1)(b)(1), 207.016. Thus, in some instances a person's name, matched with the prior record associated with that name, can be used to enhance the penalty from a misdemeanor to a felony. Moreover, identifying oneself as someone under a restraining order against domestic violence can itself lead to criminal sanctions. Nev. Rev. Stats. 33.100, 125.560.

The privilege against compulsory self-incrimination "extends not only 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute.'" *Ohio v. Reiner* , 532 U.S. 17, 20 (2001) (quoting *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951)). As respondent and its *amici* admit, the name is queried against a vast government database of information to determine if the suspect is wanted or dangerous. Resp. Br. at 17, 21; *Amicus* U.S. Br. at 13-15; *Amicus* NAPO Br. at 7-8; *Amicus* CJLF Br. at 26. Thus, the name furnishes not only a link, it is the very first link in the evidentiary chain of domestic violence laws, from which multiple negative consequences can ensue against the person whose identity has been compelled. To say that the use of one's name is not incriminating or is neutral information is belied by the realities of this case.

Further, respondent and its *amici* assert that knowledge of the identity of the suspect will aid in apprehending criminals. Resp. Br. at 16, 17, 20-24; *Amicus* U.S. Br. at 15, 16; *Amicus* CJLF Br. at 26-28; *Amicus* NAPO Br. at 13-18. The government cannot have it both ways. If indeed a person's name aids the government in enforcing the criminal laws and obtaining convictions, then the name must, by definition, be incriminating. If it were not, why would the government have any interest in making it a crime to fail to identify oneself?[5]

C. Nevada's Compulsory Identification Requirement Is Violative Of The Fifth Amendment.

Respondent and its *amici* attempt to utilize the rationale of *California v. Byers*, 402 U.S. 424 (1971), and *Baltimore City Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549 (1990), to claim that the Fifth Amendment does not protect against compulsory identification by the authorities. Resp. Br. at 38;

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[5] The state has the power to "escalate completely innocent conduct into a felony." *Brogan v. U.S.*, 522 U.S. 398, 411 (1998) (Ginsburg, J., concurring). This is particularly disquieting since innocent acts can properly be the basis for reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). A law which requires one to identify oneself upon demand or face arrest reverses the presumption of innocence so fundamental to our system of justice. *See Amicus* PrivacyActivism ("PA") Br. at 5.

Amicus U.S. Br. at 18, 20, 27; *Amicus* NAPO Br. at 20-23; *Amicus* CJLF Br. at 11. The holdings of these cases are not applicable to Nev. Rev. Stat. 171.123(3), as made abundantly clear in *Bouknight*: "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement." 493 U.S. at 557 (citation to *Byers* omitted); *see also U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) ("The fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege") (footnote omitted). Nev. Rev. Stat. 171.123(3) is not a generally applicable civil regulatory requirement. The cited cases are therefore factually distinguishable.

Unlike the statutes in *Byers* and *Bouknight*, Nev. Rev. Stat. 171.123(3) only comes into play during a *Terry* stop, which by definition is a criminal investigation. Persons who are not suspected of a crime are not subject to arrest under Nevada law for refusing to identify themselves to the police.[6] Thus, the law applies to an area of activity permeated with criminal statutes and is directed only at persons suspected of criminal activities. Moreover, as demonstrated above, the statute poses a substantial hazard of self-incrimination. Consequently, under the analytical framework of *Byers*, Nev. Rev. Stat. 171.123(3) is violative of the Fifth Amendment.

Contrary to the assertion that the issue is really a matter of "when—rather than whether—officers can learn" of a person's identity, *Amicus* U.S. Br. at 23, the central issue is whether an officer can compel identification even though the

[6] Moreover, if, as respondent argues, compelling identity aids officer safety in determining via government databases whether the suspect is wanted or dangerous, Resp. Br. at 17, 21, this in itself facilitates criminal prosecutions.

officer lacks probable cause to arrest. If, as respondent asserts, prosecution of the person would require development of evidence obtained through independent investigation, Resp. Br. at 38; *Amicus* U.S. Br. at 21-22, 25, then the government should be required to rely on that evidence rather than requiring the suspect to provide the first link in the evidentiary chain. Holding the government to its traditional evidentiary burden while at the same time respecting the individual privilege against compelled self-incrimination yields a fair and just result consistent with the Fifth Amendment.

D. The Fifth Amendment Is Not Subject To Weighing Analysis.

Amici U.S. and NAPO suggest that the Fifth Amendment privilege is not absolute and must yield to other important interests such as officer safety, crime prevention, and the logistics of routine police work. *Amici* U.S. Br. at 24-27; NAPO Br. at 23-25. Such an argument overlooks the fact that the privilege is not subject to a weighing analysis like the Fourth Amendment. *See, e.g.*, *California v. Byers*, 402 U.S. at 430. The bar of the Fifth Amendment is absolute, *New Jersey v. Portash*, 440 U.S. 450, 459, 463 (1979) (balancing is not merely unnecessary, it is "impermissible"), and its strictures are not removed by showing reasonableness. *Fisher v. U.S.*, 425 U.S. 391, 400 (1976); *Dickerson v. U.S.*, 530 U.S. 428, 452-55 (2000) (Scalia, J., dissenting) (privilege prohibits any criminal trial use of involuntarily compelled statements "since the Fifth Amendment's bar on compelled self-incrimination is absolute"). Balancing is therefore inapplicable.

E. Nevada's Statutory Scheme Is Facially Unconstitutional Under the Fifth Amendment and a Case-By-Case Approach is Inappropriate.

Amicus U.S. argues that if the Court were to find that the Fifth Amendment privilege permits individuals to refuse to comply with Nevada's identification requirement, "the proper course would be to leave for case-by-case resolution whether assertion of the privilege" is valid, rather than holding the statutory scheme facially unconstitutional. *Amicus* U.S. Br. at 27.

Analysis of the system advocated by the U.S. quickly yields an absurd outcome. Under a case-by-case rule, only persons who legitimately fear that disclosure of their names to officers will incriminate them may properly refuse to answer an identification demand by law enforcement. Innocent persons, not having incriminating identities, may not refuse. For example, suppose an officer sees two persons standing near a home which is known to the officer to be the site of a recent domestic dispute. Reasonably suspecting a restraining order violation, the officer approaches the two and demands identification pursuant to Nev. Rev. Stat.171.123(3). If the first person, who is until now innocent of any crime, refuses, he can be arrested and convicted under Nev. Rev. Stat. 199.280. The second person has a restraining order against his presence near the house, does not identify himself, and is also arrested. However, his conviction under Nev. Rev. Stat. 199.280 is precluded, because his name is precisely the "link in the chain of evidence needed to prosecute" him for violating a restraining order and thus could not legitimately be compelled by the officer. *Ohio v. Reiner*, 532 U.S. at 20. Thus, under a case-by-case system, innocent persons who choose to remain silent will be arrested and convicted, and persons whose names are incriminating must be exempted

from complying with the statute.[7] As the Court noted in *Sherman v. U.S.*, "[t]he function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." 356 U.S. 369, 372 (1958). The case-by-case "solution" fails as innocent persons would be convicted, while guilty persons go free.

II. REQUIRING *TERRY* STOPPED INDIVIDUALS TO IDENTIFY THEMSELVES VIOLATES THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

A. A Person Has A Privacy Interest In His Name.

Amicus U.S. claims there is no legitimate expectation of privacy in one's name. *Amicus* U.S. Br. at 8-12. This claim is unfounded.

[7] A side effect of such a case-by-case rule is the quagmire of litigation that will undoubtedly result. Innocent persons who would otherwise never encounter the judicial system will have to contend with criminal proceedings for remaining silent. The vast majority of people who are *Terry*-stopped are never arrested. *See, e.g.*, Casimir, Minority Men: *We Are Frisk Targets*, N. Y. Daily News, Mar. 26, 1999, p. 34; Goldberg, *The Color of Suspicion*, N. Y. Times Magazine, June 20, 1999, p. 85. These data indicate that society is paying a significant cost in infringement on liberty by these virtually random stops. *Illinois v. Wardlow*, 528 U.S. 119, 135 nn.7-8 (2000).

Similarly, persons with incriminating names will have every incentive to challenge compulsory identification requirements. For example, if in the example above the person with the restraining order complied with Nev. Rev. Stat. 171.123(3), he would be able to challenge his resulting conviction for violating the restraining order on grounds that his compelled, incriminating identification would have to be suppressed as violative of the Fifth Amendment. *Nix v. Williams*, 467 U.S. 431, 442 n.3 (1984); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964); *Kastigar v. U.S.*, 406 U.S. 441, 460-61 (1972). In short, it does no good to obtain evidence via a compelled identification because to do so would result in the suppression of that evidence.

A name is a highly significant, particularly personal piece of information that most individuals do not readily reveal to strangers except for good reason. The core purpose of the Fourth Amendment is to "protect personal privacy and dignity against unwanted intrusion by the State," *Schmerber v. California*, 384 U.S. 757, 767 (1966), and thus protects "people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. U.S.*, 389 U.S. 347, 351 (1967); *cf. Bond v. U.S.*, 529 U.S. 334, 338-39 (2000). The essential protection of the Fourth Amendment extends "wherever an individual may harbor a reasonable 'expectation of privacy,'" *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted), because the rights of privacy and personal security are "of the very essence of constitutional liberty." *Harris v. U.S.*, 331 U.S. 145, 150 (1947).

That one has a reasonable expectation of privacy in one's name is supported by the long and worthy tradition of anonymity which was key to the founding of this country. The Federalist Papers were written by James Madison, Alexander Hamilton, and John Jay under the *nom de plume* "Publius." The Federalist Papers (Clinton Rossiter, ed., 1961). The Federalist Papers sought to convince states to ratify the Constitution, which was ratified in 1788, and predated the ratification of the Fourth Amendment in 1791. As James Madison's draft of the Fourth Amendment was ultimately ratified, it is abundantly clear that the Framers contemplated a strong anonymity component within the privacy protected by the Fourth Amendment. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 555 (1999).

As Justice Brandeis famously observed, the Fourth Amendment embodies an individual's "right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. U.S.*, 277 U.S. 438, 478

(1928) (Brandeis, J., dissenting). *Cf. Chicago v. Morales*, 527 U.S. 41, 53-54 (1999).

In this digital era, to hold that there is no right of privacy in one's name would be tantamount to saying that no right of privacy exists at all and that all federal laws regulating the use of personal information do not relate to an individual's privacy. As the government has and is accumulating large identification schemes and electronic data banks[8] of information on its citizens, an officer who has compelled a suspect to divulge his name can learn, within a matter of seconds, incredibly detailed information about that person. Such information goes far beyond that which might assist in officer safety, and is equivalent to exploring the contents of his file cabinets, personal history, and family diary, essentially an individual's "papers" as originally contemplated by the Fourth Amendment.

Amicus U.S. relies on cases involving physical evidence exposed to public observation, such as trash, open fields, driving on public roads, and the tone of one's voice[9]—and are thus distinguishable. *Amicus* U.S. Br. at 8-10. A name is neither a physical characteristic[10] nor is it exposed to the public at large, as it has not yet been tattooed on our

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[8] Detailed information about systems such as NCIC, NLETS, MATRIX, DAVID, TWIC and US-VISIT can be found at Pet. Br. at 24 n.9; Resp. Br. at 5, 21-22; and *Amicus* EPIC Br.

[9] *See, e.g., U.S. v. Dionisio*, 410 U.S. 1, 9 (1973); *U.S. v. Mara*, 410 U.S. 19, 21 (1973).

[10] Moreover, not all physical characteristics are considered beyond the purview of the Fourth Amendment. Nail scrapings, X-rays, and pubic hair samples have been held to enjoy Fourth Amendment protection. *See, e.g., Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (fingernail scrapings); *U.S. v. Vega-Barvo*,729 F.2d 1341 (11th Cir.) (X-rays), *cert. denied*, 469 U.S. 1088 (1984); *Bouse v. Bussey*, 573 F.2d 548 (9th Cir. 1977) (pubic hair). It makes no sense to suggest that intimate non-physical attributes of a person's identity, such as a name, could receive less protection under the Fourth Amendment than physical characteristics.

forearms. Unlike a physical characteristic, such as one's handwriting or voice, a stranger cannot divine one's name from mere observation. People do not generally walk down the street wearing name tags or shouting their names. Instead, they jealously guard their identity, in numerous ways, for a variety of reasons. People typically keep identity credentials to themselves, secured in purses or wallets, if they elect to carry credentials at all.

Although people may reveal their names as a matter of course in everyday social or business interactions, such as introducing oneself at a party or using a check or credit card to make a purchase, these are examples of voluntary disclosure, made to a limited number of people, for a particular purpose. A person may elect to provide a stranger with only his first name, a nickname, or even a false name, for a variety of reasons. For example, a person in group therapy may identify himself only by a nickname; a person meeting a new casual acquaintance may give only a first name; another might give a false name to fend off an unwanted suitor.

Moreover, there are numerous instances in which people choose not to reveal their identities but to remain anonymous. This may be to prevent political retribution, as in the case of the Federalist Papers or the Civil Rights Movement, or out of a concern for personal privacy as in the case of paying cash at a movie or motel, or having an unlisted telephone number with caller ID blocking. Refusing to identify oneself to an intrusive stranger is considered just plain common sense. Children are routinely warned not to talk to strangers. In judicial proceedings, minors' names are routinely referred to by initials only. We are all cautioned not to reveal personal information in order to avoid harassment and identity theft.[11]

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[11] Contrary to the suggestion that a *de facto* national ID system is already in place, *Amicus* CJLF Br. at 15, mandatory identification laws are neither on the books nor consistent with traditional social mores, wherein revealing one's identity is done on a strictly voluntary basis for social or business reasons. Pedestrians are not required to carry identification. In addition, many homeless people are unable to obtain or keep identification. *Amicus* NLCHP Br. at 14-15, 26-28.

Unlike the physical evidence at issue in *U.S. v. Dionisio*, 410 U.S. 1, 15 (1973), which "involves none of the probing into an individual's private life and thoughts that marks interrogation and search" (quoting *Davis v. Mississippi*, 394 U.S. 721 (1969)), demanding one's name probes directly into one's mind. How more deeply can the government delve into one's private life and thoughts than to compel revelation of one's name and search vast data banks for information regarding one's private life? Intruding upon the contents of the mind to obtain one's name is akin to being "compelled to reveal the combination to his wall safe." *Doe v. U.S.*, 487 U.S. at 219 (Stevens, J., dissenting), *see also id.* at 210 n.9 (majority opinion). In sum, one's name is at the very core of an individual's privacy.

B. Nevada's Statutory Scheme Undermines The Probable Cause Standard

Respondent correctly identifies that a practice's acceptance as reasonable at common law can bear heavily on whether or not that practice is violative of the Fourth Amendment. However, respondent incorrectly asserts that a compulsory identification requirement would have been reasonable under the common law. Resp. Br. at 9-11. The text of the Fourth Amendment makes no reference to reasonable suspicion. Thus, examples relied on by respondent are inherently suspect because they involve warrantless arrests based on probable cause.

The "whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority." *Rice v. Connolly*, 2 Q.B. 414, 419 (C.A.1966). At the time of the Framers, common law did not recognize any broad power of the police to detain "suspicious" persons.

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 629 n.216 (1999). Three narrow exceptions to this rule existed, however: (1) preventing an incipient affray; (2) detaining a person who had inflicted a grave wound to determine whether the victim would live or die; (3) dissuading nightwalking, which was "viewed almost as an offense in its own right." *Id.* None of these exceptions applies to the facts of this case.

Moreover, to the extent the "stop" portion of the *Terry* standard has historical antecedents in nightwalker statutes, Mr. Hiibel was stopped, *i.e.*, seized, when Deputy Dove detained him upon reasonable suspicion of a battery; Dove's repeated demands for identification amounted to an unreasonable search not supported by probable cause. This does not comport with the common law understanding that one has the right to refuse to answer questions put to him by persons in authority. The Framers of the Constitution would have considered it an indignity under the common law to be subjected to compelled identification upon mere suspicion of a crime.[12]

C. The Significant Intrusion On An Individual's Constitutionally Protected Rights Is Not Outweighed By The Government's Interests.

Petitioner identifies numerous constitutional rights which are significantly impacted by Nevada's compulsory identification scheme. Pet. Br. at 36. Respondent and its *amici* counter that officer safety and enhanced crime prevention outweigh such concerns. In determining the weight of the parties' respective positions, however, it is important to

[12] Irrespective of whether the Framers contemplated or condoned compulsory identification of suspicious persons, it is impossible to believe that they would have found such demands reasonable in light of modern database technology and the expansive amount of information which is immediately accessible to field officers as a result. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993).

remember that "the majority of *Terry* detainees who give their names will never be arrested, never be charged with a crime, and never be prosecuted in a criminal case." *Amicus* NAPO Br. at 24. Thus, when balancing the rights of *Terry* detainees against any claimed governmental interest, it is important to consider that the majority of these individuals have been confronted by the police and placed under an unnerving and embarrassing shadow of suspicion for merely appearing out of the ordinary or otherwise innocently drawing the attention of a police officer.

Moreover, public safety includes protection of citizens' constitutional rights: the public interest is served not only by effective law enforcement but also by safeguarding individual freedoms and privacy from arbitrary governmental interference.

1. *Assertions that Requiring* Terry *Subjects to Identify Themselves Will Increase Police Officer Safety are Unsupported.*

Respondent and its *amici* argue that police safety will be enhanced by requiring the subjects of *Terry* stops to identify themselves. Resp. Br. at 17-20, *Amicus* U.S. Br. at 13-16, *Amicus* NAPO Br. at 4-10. To support its position, *Amicus* NAPO cites several statistics which confirm that police work can be dangerous. *Id.* at 5. Extrapolating these statistics, NAPO claims that implementing compulsory identification during *Terry* stops would significantly enhance officer safety. While attempting to improve officer safety is a laudable goal, a conclusion that mandatory identification promotes such safety is speculation.

The Federal Bureau of Investigation (FBI) compiles annual statistics on law enforcement officers who were killed or assaulted in the line of duty, whether feloniously or accidentally. U.S. Dept. of Justice, *FBI's Law Enforcement Officers Killed and Assaulted*, 2000. In 2000, the year in which the

instant offense occurred, 8,653 agencies contributed data including narrative descriptions of the incidents in which police officers were killed. *Id.* at 43-56. In almost none of these instances would death have been averted if compulsory identification under *Terry* had been adopted. In the few unclear cases, the effect of compulsory identification on the officer's life remains debatable.[13] Moreover, the vast majority of detainees, even ones who have been given *Miranda* warnings, provide identification upon request. *Amicus* PA Br. at 26.

Though at first blush it may seem strange, a sound argument can be made that compulsory identification could lull officers into a false sense of security, and potentially subject them to greater danger than when identity may not be compelled. *Amicus* NAPO's suggestion that officers would alter their behavior toward the detainee, "if, say, the answer to their question is 'John Dillinger' as opposed to 'Dr. Billy Graham'" underscores the problem. *Amicus* NAPO Br. at 9. Dangerous, wanted individuals will undoubtedly supply false names to officers during a *Terry* encounter if they are compelled to give names. Upon hearing the name, "Billy Graham," and confirming that Dr. Graham is not known to be a dangerous individual, a field officer may relax his guard, potentially subjecting himself to a greater threat. Officers should treat *all* suspects who are unknown to them with the same degree of caution as suspects with a known criminal record.[14]

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[13] In the past decade, there were approximately 10.5 cases per year of death during *Terry* stops. *Amicus* NAPO Br. at 5. In some cases there was still injury even when ID was provided.

[14] Not only is this important to officer safety, but may well be essential to public safety as well. If an officer receives a benign name from a person exhibiting mildly suspicious behavior, that officer may more readily accept an explanation of a suspect's intent than would otherwise be warranted if the officer had to rely on his own senses, experience, and investigative skills to determine whether a person posed a threat.

Similarly, officers may become so engrossed in determining a suspect's identity during a *Terry* stop that they neglect to conduct standard and well-tested fieldwork as a result. Defendant's Exhibit A video discloses that Deputy Dove never in fact investigated the alleged battery of Petitioner's daughter. He did not frisk Petitioner, nor did he handcuff him until the time he arrested Petitioner. Instead, he spent several minutes demanding identification and refusing to explain to Petitioner why he wanted that identification. The law already provides Deputy Dove very strong tools to help protect himself when conducting investigations in the field. Any argument that he requires more power, especially when he plainly isn't sufficiently concerned about his safety to conduct a pat down, is specious.

2. *Mandatory Identification During A* Terry *Stop Will Not Significantly Enhance Police Ability To Fight Crime.*

Petitioner has never asserted that the police should not be able to ask a person's identity during a *Terry* stop. Instead, Petitioner asserts that the police may not arrest a person for refusing to identify himself. It is government compulsion, by threat of imprisonment, which makes the identification repugnant to the Constitution. The vast majority of persons subjected to a field stop voluntarily answer questions posed to them by officers. *Amicus* PA Br. at 26. Thus, the potential crime prevention benefits extolled are only applicable against those few people who choose to remain silent.

Petitioner has already pointed to results sanctioned by *Amicus* U.S. under which innocent persons may be convicted for failing to identify themselves to officers, but guilty persons may not. How can incarcerating the otherwise innocent while letting the guilty go free aid effective law enforcement?

Finally, it is asserted that if a police officer is allowed to identify a *Terry* detainee, then that person will be deterred

from committing a crime. U.S. Br. at 15. "Public safety" includes protecting citizens' rights against governmental encroachment. The public interest is served not only by effective law enforcement, but also by safeguarding individual liberties. As Justice Stewart explained, "[t]he inevitable result of the Constitution's prohibition against unreasonable searches and seizures . . . is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power."[15]

3. *Adoption of a Compulsory Identification Scheme Will Have a Chilling Effect on the Exercise of Important First Amendment Rights*

Amicus U.S. suggests that because "there is no indication that petitioner was engaged in expressive activity when he was detained, this case does not implicate any interest in anonymous speech."[16] *Amicus* U.S. Br. at 16. Using such reasoning, one could just as easily assert that officer safety is not implicated by this case because at no time during his encounter with Petitioner was Deputy Dove's safety in jeopardy. The assertion that the First Amendment is not implicated belies what little weight the government gives to personal liberties when attempting to balance those liberties against its own interests.

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[15] Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1393 (1983).

[16] In a similar vein, although the claim that Mr. Hiibel has abandoned any vagueness challenge is perhaps overstated (*Amicus* CJLF Br. at 6-7), should the Court wish to address vagueness Mr. Hiibel requests that the parties be permitted to submit supplemental briefs on that issue.

Compulsory identification presents a very real threat to the exercise of First Amendment rights. Pet. Br. at 36-42; *Amicus* PA Br. at 10-12. *Amicus* NAPO's assertion that First Amendment jurisprudence protects a speaker's "anonymity from his potential audience, not from proper regulatory authorities such as police departments," *Amicus* NAPO Br. at 26, is unsupported and alarming. Free movement on public streets is well recognized as an essential component of engaging in many First Amendment activities. Many *Terry* encounters may involve persons who are on their way to participate in protected activities, especially in the case of picketing, during which a *Terry* detainee may be engaged in First Amendment activity at the time of the stop. *See, e.g., Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003).

As explained in *NAACP v. Alabama ex rel. Patterson*, "it is hardly a novel perception that compelled disclosure of affiliation with groups in advocacy" may impermissibly restrain the freedom of association. 357 U.S. 449, 462 (1958). It is likewise hardly novel to suggest that when officers have the power to compel pedestrians to identify themselves upon pain of arrest, pedestrians engaged in speech activities, especially unpopular ones, will have their speech chilled.

CONCLUSION

The issue in this case goes to the nature of freedom and the individual's relationship to the state. Protection of individual privacy is imperative in order to remain a free society. Compelled identification during *Terry* stops undermines that imperative.

The proper solution is to adopt a bright line rule which provides clear guidance to the police while at the same time protecting individual liberties without overburdening the

courts, namely, that suspects may be questioned, but their answers may not be compelled. Accordingly, the judgment of the Supreme Court of the State of Nevada should be reversed.

Respectfully submitted,

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